Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Petition of Glide Talk, Ltd. for Expedited Declaratory Ruling	)	CG Docket No. 02-278

COMMENTS OF PATH, INC. IN SUPPORT OF GLIDE TALK, LTD.'S PETITION FOR EXPEDITED DECLARATORY RULING

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Path, Inc. ("Path"), a popular social networking application, submits these comments in response to the Federal Communications Commission's Public Notice seeking comment on the Petition of Glide Talk, Ltd. ("Glide Talk") for Expedited Declaratory Ruling ("Petition") clarifying the scope of the Telephone Consumer Protection Act ("TCPA").

SUMMARY

The TCPA, a statute intended to curb vexatious telemarketing practices, has been transformed into a vehicle for vexatious lawsuits, as many young technology companies such as Path know all too well.

Path is a free social networking application for smartphones and other mobile devices that allows users to share private messages, photos, videos, stickers, experiences, and thoughts with a circle of no more than 150 friends and family members. One of the ways that users may invite a personal contact to interact on Path is by sending a text message to that person at a phone number that is already known to the user and already resident on the user's mobile phone. Path users decide which, if any, of their existing contacts they wish to invite, and select the phone number from their own contacts list to which they want to send a text invitation. Because Path enables users to send these invitation messages through the

Path system, it has been named as a defendant in three putative class actions, alleging that the text message invitations that users send to their existing friends and family members violate the TCPA. The plaintiffs' lawyers in each of these cases demand from Path millions of dollars in statutory damages with no harm alleged.

Path's experience with the cottage industry of TCPA litigation is far from unique. There has been an epidemic of these suits—more than 1,200 in 2013 alone[1]—all demanding massive windfalls for communications that have caused no harm and that the TCPA was never intended to cover. Companies like Path, their investors, and their employees must fight these strike suits with their futures at risk, or pay extortionate settlements. And because of the hyper-litigious environment these suits engender, innovations in the consumer communication space are left on the shelf. Indeed, attorneys for technology companies today must and do reflexively reject attempts by their clients to offer text messaging functionalities as part of their services to consumers, for fear that their clients will suffer the

[1] *See* Arent Fox, Alert, *FCC Seeks Comment on Two Petitions Related to Recent TCPA Rule Changes* (Nov. 5, 2013), http://www.arentfox.com/newsroom/alerts/fcc-seeks-comment-two-petitions-related-recent-tcpa-rule-changes.

same fate visited upon Path.

By addressing the issues presented in the Petition, the Commission can eliminate some of the most abusive TCPA litigation. The Petition is addressed to one of the central issues in TCPA litigation—whether the text messages or "calls" at issue come within the TCPA as having been sent by an "automatic telephone dialing system" ("ATDS").[2] By its terms, the TCPA applies only to "calls" made using equipment that has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator, and (B) to dial such numbers. *See* 47 U.S.C. § 227(a). But TCPA plaintiffs' lawyers have endeavored to read this limitation out of the statute entirely. Instead of applying the statute to curb abusive telemarketing through a particularly pernicious piece of equipment, they contend that any device that can dial a phone number automatically from a list is an ATDS, even if it does not have the capacity

[2] *See, e.g.*, *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (holding texts sent to cell phones constitute "calls" for TCPA purposes). Path disagrees with the proposition that all text messages are "calls" and joins Glide Talk's request that the Commission examine and clarify this issue. *See* Pet. at 6 n.11. Path also joins Glide Talk's request that the Commission clarify: 1) that app providers that merely facilitate consumers sending invitation text messages do not "make" calls under the TCPA and 2) that third-party consent is sufficient for user-initiated invitation text messages sent to wireless numbers.

to randomly or sequentially generate numbers.

That reading of the ATDS requirement is badly misguided. It is, of course, at odds with the plain text of the TCPA. More fundamentally, that reading would render most calls or texts from today's smartphones prima facie TCPA violations. Most phones now have speed dial and group texting capabilities, along with auto-response capabilities. That means they have the present capacity to automatically dial numbers from pre-existing lists without the need for a human to manually key in digits. And even if they do not come pre-programmed that way, smartphones are computers, and like any other computer they can, with the appropriate software modifications, be modified to perform such automated dialing. If, as plaintiffs' lawyers claim, the TCPA's ATDS requirement is satisfied by equipment that merely has the actual (or theoretical) ability to automatically dial numbers from a list, we will have seen only the tip of the iceberg in TCPA litigation.

To protect innovative businesses and the consumers they serve from an even greater onslaught of lawyer-driven litigation, the Commission should reject the plaintiff bar's audacious statutory interpretation and confirm that only equipment that has the capacity to automatically

generate random or sequential phone numbers constitutes an ATDS.

ARGUMENT

I. Nuisance TCPA Litigation Is A Burgeoning Problem That Leads To Coercive Settlements And Threatens To Chill Legitimate Business Communications

The TCPA was enacted in 1991 "in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls" that were "a 'nuisance and an invasion of privacy.'" *Satterfield*, 569 F.3d at 954 (quoting S. Rep. No. 102-178, at 1 (1991)). In many cases—including cases that have been filed against Path, Glide Talk, and other innovative networking communications services—the statute is being used in ways that have nothing to do with telemarketing or privacy invasions. Indeed, all sectors of the economy—footwear retailers, apparel manufacturers, fast-food restaurants, banks, debt collectors, electronic payment services, and social networks—are being targeted by the massive uptick in TCPA lawsuits. *See* U.S. Chamber, Institute for Legal Reform, The Juggernaut of TCPA Litigation at 1 (Oct. 2013) ("TCPA Juggernaut"), http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautof TCPALit_WEB.PDF.

The reasons for this litigation explosion are not hard to see. The TCPA creates a private right of action along with statutory damages of $500 to $1,500 for each call, text, or fax. 47 U.S.C. § 227(b)(3). Plaintiffs are not required to prove that they suffered any actual harm or that the defendant acted with any culpable intent. Given this scheme, especially when harnessed to a class action procedure where the plaintiff purports to represent all other people who received calls or texts from the same company over a four-year period, potential damages in TCPA cases can soar beyond any reason.

For example, in three separate class actions, plaintiffs have sued Path based on text messages *initiated by Path users* that invited people—whose personal contact information had previously been provided to the Path users and was stored on their smartphones—to join Path and share photos with those Path users. Am. Compl. ¶¶ 10, 12, *Smeets v. Path, Inc.*, No. CV 13-03057 (N.D. Cal. Aug. 1, 2013) (ECF No. 21) (dismissed); Am. Compl. ¶ 18, *Montes v. Path, Inc.*, No. 3:13-cv-02218 (S.D. Cal. Nov. 25, 2013) (ECF No. 9) (pending); Compl. ¶ 13, *Sterk v. Path*, No. 1:13-cv-02330 (N.D. Ill. Mar. 28, 2013) (ECF No. 1) (pending) ("*Sterk* Complaint"). The

lawyers in each of these cases have demanded hundreds of millions of dollars in statutory damages.

Similar examples of abusive TCPA lawsuits in contexts having nothing to do with telemarketing abound:

- The plaintiffs in *Moss v. Twitter* brought a class action against Twitter on the basis of individual text messages they received from Twitter confirming their requests to no longer receive Tweets via text that they had previously signed up to receive. Compl. ¶¶ 10-14, No. 3:11-cv-00906 (S.D. Cal. Apr. 28, 2011) (ECF No. 1) (dismissed).

- A plaintiff sued Square (an electronic payment service) in a class action based on a single transaction receipt that was sent to his putative number via text message after a user made a purchase using Square and requested a receipt be sent to that number. Compl. ¶¶ 16-17, *Ball v. Square, Inc.*, No. 3:12-cv-06552-SC (N.D. Cal. Dec. 28, 2012) (ECF No. 1) (dismissed).

- A plaintiff brought a class action against Voxernet after receiving a text message from an acquaintance inviting plaintiff to use defendant's walkie-talking application. *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125 (W.D. Wash 2012) (settled Jan. 4, 2012).

- A plaintiff sued PayPal in a class action after receiving a "welcome" text message from the defendant when he added his cell phone number to his PayPal account. *Roberts v. PayPal, Inc.*, No. C 12-0622, 2013 U.S. Dist. LEXIS 76319 (N.D. Cal. May 30, 2013) (summary judgment granted).

- Plaintiffs brought a class action against Google after receiving a text message invitation to join a group text message conversation. *Pimental v. Google Inc.*, No. C-11-02585, 2012 U.S. Dist. LEXIS 28124 (N.D. Cal. Mar. 2, 2012) (settlement approved June 26, 2013).

- A plaintiff sued GroupMe and Twilio in a class action after Plaintiff received an invitation from a user of the GroupMe group texting application to join a group text message conversation. Am. Compl. ¶ 33, *Glauser v. Twilio Inc.*, No. 11-cv-02584 (N.D. Cal. Sept. 15, 2011) (ECF No. 34) (stayed).

- A plaintiff brought a class action against MySpace after receiving a text message from the social networking site confirming his request to opt out of receiving notification text messages that he had previously authorized. Compl. ¶¶ 10-14, *Noorpavar v. MySpace, Inc.*, No. 11-cv-0903 (S.D. Cal. Apr. 28, 2011) (ECF No. 1) (voluntarily dismissed June 20, 2011).

- A plaintiff sued Facebook in a class action after receiving a text message from Facebook confirming his request to opt out of notification text messages that he had previously authorized. Compl. ¶¶ 10-14, *Lo v. Facebook, Inc.*, No. 11-0901 (S.D. Cal. Apr. 28, 2011) (ECF No. 1) (voluntarily dismissed July 7, 2011).

- A plaintiff brought a class action against Glide Talk based on a text message that he received from a user of this video messaging service inviting him to join the service so he could communicate with the user by video messaging. Am. Compl. ¶ 14, *Coffman v. Glide Talk, Ltd.*, No. 1:13-cv-5190 (N.D. Ill. Oct. 28, 2013) (ECF No. 22) (pending); *see also* Pet. 3-4.

- A plaintiff sued the Los Angeles Lakers after he sent a text message to the team while attending a game, which he hoped would be displayed on the arena scoreboard, and received a text message from the Lakers confirming that his request had been received. *Emanuel v. L.A. Lakers, Inc.*, No. 12-9936-GW, 2013 U.S. Dist. LEXIS 58842, at *2 (C.D. Cal. Apr. 18, 2013) (settled).

Today, individuals are making livings as TCPA plaintiffs, with websites instructing consumers about how to "set up" a lawsuit to maximize potential damages before negotiating a quick settlement. *See*

TCPA Juggernaut at 4.[3] All of this confirms the truth of one court's observation that "remedial laws can themselves be abused and perverted into money-making vehicles for individuals and lawyers." *Saunders v. NCO Fin. Sys.*, 910 F. Supp. 2d 464, 465 (E.D.N.Y. 2012).

The massive statutory damages that plaintiffs can seek in TCPA class actions exert an *in terrorem* effect. The risk of ruinous liability puts immense pressure on defendants to settle cases, even if they are entirely without merit. Courts have recognized this pattern in similar situations. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not . . . . The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.") (citation omitted); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) ("[Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.").

[3] *E.g.*, *How to Sue A Telemarketer*, Impact Dialing (May 20, 2013), http://www.impactdialing.com/2012/05/how-to-sue-a-telemarketer/; *Suing Telemarketers—Simple and Cheap*, KilltheCalls.com, http://www.killthecalls.com/suing-telemarketers.php (last visited Jan. 2, 2014).

Eye-popping settlements are becoming a reality in TCPA litigation. In the last two years alone, there have been at least a dozen TCPA settlements of greater than $5 million. TCPA Juggernaut at 2. The success of plaintiffs' lawyers in such cases only encourages more lawsuits. And those suits are increasingly targeting text message communications far afield from the kinds of telemarketing calls that animated the TCPA.

Unless the Commission clarifies the scope of the TCPA as requested by Glide Talk, strike suits like the ones against Path and Glide Talk will continue to proliferate, defendants will be compelled into coercive settlements, and legitimate uses of text messaging by innovating companies and their users will be significantly threatened.

II. The Commission Should Clarify That The TCPA Applies Only To Text Messages Sent By Equipment That Has The Present Capacity To Store or Produce, and Send Texts To Randomly or Sequentially Generated Numbers

One of the primary reasons that the abusive TCPA text messaging suits described above have proliferated is a perceived ambiguity—at least among plaintiffs' counsel—as to the scope of the TCPA's definition of "automatic telephone dialing system." While plaintiffs routinely allege in TCPA class actions that the system used to send the text messages at

issue "has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator, and (B) to dial such numbers," they later argue that no such capacity is required.

For example, in one of the putative class actions pending against Path, the Complaint includes the statutory language limiting the definition of automatic telephone dialing system to equipment with the capacity to call random or sequentially generated phone numbers. *Sterk* Compl. ¶ 22. But Plaintiff's counsel is now arguing that the Commission and federal courts following the Commission's lead have expanded this definition to cover any "equipment that is capable of dialing phone numbers from a list without human intervention," regardless of their capacity to store or produce, and dial, randomly or sequentially generated numbers. *See* Plaintiff Kevin Sterk's Corrected Mot. to Compel Path to Produce Its SMS Transmission Logs at 2 (Dec. 27, 2013) (ECF No. 60); *see also id.* at 4, 6-7.

In support of this position, Plaintiff's counsel relies upon statements made by the Commission in two TCPA Implementing Orders referencing its conclusion that predictive dialers used by telemarketers fall within the definition of "automatic telephone dialing systems." *Id.* at 6 (citing *In the*

Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("*2003 FCC Order*"), 18 FCC Rcd. 14014, 14091-92 (July 3, 2003); *In re Rules & Regulations Implementing the TCPA of 1991* ("*2012 FCC Order*"), 27 FCC Rcd. 15391, 15392 n.5 (Nov. 29, 2012) (citing *2003 FCC Order*)).

Plaintiff's counsel also relies on two district court cases, which in turn relied upon the FCC's expansive language in its rulemaking regarding predictive dialers. *See Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723, 727 (N.D. Ill. 2012) ("The FCC concluded that predictive dialers are governed by the TCPA because, like earlier autodialers, they have the capacity to dial numbers 'without human intervention.' In doing so, it interpreted 'automatic telephone dialing system' to include equipment that utilizes lists or databases of known, nonrandom telephone numbers.") (footnote omitted)[4]; *Gragg v. Orange Cab Co., Inc.*, 942 F. Supp. 2d 1111, 1113 (W.D. Wash. 2013) ("The Federal Communications Commission ('FCC') slightly altered this definition when it determined that equipment that dials a list of numbers (such as a

[4] Notably, this case did involve a predictive dialer, and thus the Court concluded it was bound to follow the FCC's ruling on predictive dialers.

business's list of customers), rather than dials random or sequential numbers, is still an ATDS, because the basic function of such dialing equipment is the same—the capacity to dial numbers without human intervention." (internal quotation marks omitted)).

The expansive interpretation of "automatic telephone dialing system" now being advanced in TCPA text messaging lawsuits would transform the TCPA into a statute that regulates nearly every call or text from a smartphone. Because most of these devices have speed dial, group texting, and auto-response capabilities, they have the present capacity to automatically dial numbers from pre-existing lists, without a human manually typing in each number. Thus, under plaintiffs' proposed definition of ATDS, the fact that a smartphone is capable of automatically dialing numbers from lists—whether or not that function is used—would render that phone an ATDS, making nearly every call or text message from a cell phone a prima facie violation of the TCPA. This is a result that is clearly well outside of the specific abusive telemarketing practices Congress intended to combat.

Such an expansive interpretation also is inconsistent with rulings by other courts, which have remained faithful to Congress's limiting language,

correctly concluding that the requisite capacity is the capacity to store or produce and dial randomly or sequentially generated numbers. *See, e.g.*, *Satterfield*, 569 F.3d at 951 (holding that an ATDS must have the "capacity" to "store, produce, or call randomly or sequentially generated telephone numbers"); *Hunt v. 21st Mortgage Corp.*, No. 2:12-cv-2697, 2013 U.S. Dist. LEXIS 132574, at *11 (N.D. Ala. Sept. 17, 2013); *Ibey v. Taco Bell Corp.*, No. 12-cv-0583-H, 2012 U.S. Dist. LEXIS 91030, at *9 (S.D. Cal. June 18, 2012); *Stockwell v. Credit Mgmt.*, No. 30-2012-00596110, slip op. at 2 (Cal. Super. Ct. Oct. 3, 2013); *see also In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, 847 F. Supp. 2d 1253, 1260 n.8 (S.D. Cal. 2012) (noting requirement that machine "needs to have the capacity to store or produce numbers using a random or sequential number generator"); *Emanuel v. L.A. Lakers, Inc.*, No. CV 12-9936, 2013 U.S. Dist. LEXIS 58842, at *13 (C.D. Cal. Apr. 18, 2013) (noting plaintiff's complaint failed to support an inference that an ATDS was used because *inter alia* "Plaintiff does not allege that he received the Lakers' text 'randomly' but rather in direct response to Plaintiff's initiating text").

For example in *Hunt*, the Northern District of Alabama held in the context of a motion to compel a Rule 34 inspection that "to meet the TCPA

definition of an 'automatic telephone dialing system,' a system must have a present capacity, at the time the calls were being made, to store or produce and call numbers from a number generator." 2013 U.S. Dist. LEXIS 132574, at *11 (emphasis added). Likewise, in *Stockwell*, the California Superior Court granted summary judgment to the defendant where there was no evidence introduced that the defendant possessed a random or sequential number generator. No. 30-2012-00596110, slip op. at 2. And in *Ibey*, the court granted a motion to dismiss where the complaint failed to allege "that the system uses a random or sequential number genera[tor]." 2012 U.S. Dist. LEXIS 91030, at *9.

Thus clarification regarding the scope of "automatic telephone dialing system" as defined by Congress is urgently needed before additional courts adopt the wildly expansive definition proposed by Plaintiff's counsel in one action against Path, and plaintiffs' counsel in numerous other putative class actions against other legitimate mobile app-based communication services.

A. The TCPA Was Never Intended to Cover and On Its Face Does Not Regulate All Automatic Dialing Systems

The provision of the TCPA at issue here—and in most of the text messaging strike suits brought under the statute—applies only to calls made using an "automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). This provision narrowly regulates the use of particular kinds of automatic calling technology that were typically used by telemarketers to make unsolicited phone calls to unwilling recipients at the time the statue was passed. *See, e.g.*, S. Rep. 102-178, at 2 ("[h]aving an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially"); *id.* ("some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls").

Congress could have drafted the statute to encompass all automated calls to wireless numbers, but it did not. Instead, Congress carefully limited the definition of "automatic telephone dialing system" to "equipment which has the capacity" both (A) "to store or produce telephone numbers to be called, using a random or sequential number generator" and (B) "to dial such numbers." 47 U.S.C. § 227(a). This narrow and highly

specific definition serves an important purpose. It ensures that not every phone call to a cell phone becomes a federal case. It confines potential TCPA claims based on calls to wireless numbers to those involving specialized equipment that is capable of randomly or sequentially generating and dialing telephone numbers. Congress was concerned that by using such equipment intrusive telemarketing calls might reach unlisted phone numbers, hospitals, or emergency organizations. *See*, *e.g.*, 137 Cong. Rec. 35,302 (Nov. 26, 1991); H.R. Rep. No. 101-633, at 3 (1990); H.R. Rep. No. 102-317, at 10 (1991); S. Rep. No. 102-178, at 2. Likewise, Congress was concerned that telemarketers might "dial numbers in sequence, thereby tying up all the lines of a business and preventing outgoing calls." S. Rep. No. 102-178, at 2. Accordingly, Congress in the TCPA did not regulate all automatically dialed calls to cell phones; rather, it regulated such calls only when the equipment used to make the calls is capable of storing or producing, and dialing, randomly or sequentially generated telephone numbers. 47 U.S.C. § 227(a)(1).

To the extent that the Commission's statements in connection with its ruling on predictive dialers suggest that equipment without such capabilities still may trigger TCPA liability, it should clarify its prior

ruling and state unequivocally that it has not eliminated Congress's specific limitations on the definition of "automatic telephone dialing system." Indeed, a close reading of the *2003 FCC Order* shows that the Commission concluded that a predictive dialer is an ATDS only after it first found that predictive dialer "hardware, when paired with certain software, *has the capacity to store or produce numbers and dial those numbers at random, in sequential order*, or from a database of numbers." 18 FCC Rcd. at 14091 (emphasis added) (footnote omitted). This suggests that the Commission was not in any way changing the definition of an ATDS as set forth in the TCPA, but rather, applying it to a technology with the requisite random or sequential number generating capacity, but which capacity is not used in practice.

Indeed, in subsequent rulemaking, the Commission has referenced the full language of the ATDS definition, further confirming that it did not intend to eliminate the random or sequential number generator requirement from the TCPA's definition of an ATDS. *See, e.g.*, *2012 FCC Order*, 27 FCC Rcd. at 15392 n.5. And of course, the Commission lacks the authority to rewrite the TCPA to eliminate Congress's statutory limitation on the technology that falls within the scope of the TCPA. *See La. Pub.*

Serv. Comm'n v. FCC, 476 U.S. 355, 376 (1986) ("As we so often admonish, only Congress can rewrite [a] statute."). Even if the Commission did intend to rewrite the definition of an ATDS to eliminate Congress's limiting language, the Commission at a minimum should make clear that its alteration was limited to the context of predictive dialers—equipment used to make intrusive telemarketing calls—and does not apply in any other context. As explained above, plaintiffs' counsel are invoking the Commission's language from its predictive dialer ruling in contexts that do not involve predictive dialers, telemarketing, or any calls that threaten to tie up emergency and business numbers. Congress did not intend this result, and the Commission should clarify that it did not either.

B. The Plain Language of the TCPA Requires a *Present* Capacity to Store or Produce, and Call Randomly or Sequentially Generated Numbers

Not only should the Commission clarify that it has not dropped the TCPA's requirement that to be an ATDS the equipment must be capable of storing or producing, and dialing random or sequential numbers from a number generator, but it also should clarify that it rejects any interpretation of this requirement that effectively nullifies it. Plaintiffs in many cases have tried to argue that equipment falls within the scope of

the TCPA's prohibitions on calls to wireless numbers if the system could *theoretically* be modified (in some unstated way) to provide the requisite capacity to generate random or sequential numbers, even if that capacity is lacking at the time of the calls in question. *See* Monica Desai et al, *A TCPA for the 21st Century*, 8 Int'l J. Mobile Marketing 75, 79-82 (2008). Such an interpretation should be rejected.

First, the plain language of the TCPA defines "automatic telephone dialing system" as "equipment which ***has the capacity***. . . ." 47 U.S.C. § 227(a) (emphasis added). Congress chose to use the present tense "has the capacity"; therefore any interpretation of the definition must give effect to this choice. *See Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) (because "Congress' choice of words is presumed to be deliberate," courts "must give effect to [this] choice" (citation omitted)).

Second, an interpretation of "has the capacity" to mean "has the capacity if modified to include it" would effectively nullify the required ATDS element of a TCPA claim because "in today's world, the possibilities of modification and alteration are virtually limitless." *Hunt*, 2013 U.S. Dist. LEXIS 132574, at *11. *Any* computerized system—including a

smartphone—can be modified with software to generate phone numbers randomly or sequentially. *Id.* Thus, if this interpretation were adopted, any text message—even a text message sent from an iPhone—could be the predicate of TCPA litigation, shifting the burden to the sender to show prior express consent. That is an absurd position. The Commission can scuttle that fallacious argument by making clear that the TCPA applies only to calls to wireless devices made by equipment that has the *current* capacity, without need for modification or installation of new technology, "to store or produce telephone numbers to be called, using a random or sequential number generator" and "to dial such numbers."

CONCLUSION

The clarifications requested by Glide Talk in its petition, and Path herein, would go a long way to limiting the abusive potential of TCPA litigation and confining the statute to its proper sphere. Absent clarification, plaintiffs' counsel will continue to argue what amounts to the position that any smartphone or computer system that facilitates the sending of text messages constitutes an ATDS. Thus any company that enables its users to communicate with their own contacts by text message will be threatened with potentially devastating liability, and defendants in

those cases will continue to be coerced into settlements rather than risk the fight against claims alleging millions, or even billions, of dollars in damages. This Petition offers an ideal opportunity for the Commission to put a stop to this destructive cycle.

For these reasons, Path urges the Commission to grant Glide Talk's Petition and clarify that the TCPA applies only to devices that have the current capacity to randomly or sequentially generate and call such numbers.

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